

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)

MOLOKAI PUBLIC UTILITIES, INC.)

DOCKET NO. 2009-0048

For Review and Approval of Rate)
Increases, Revised Rate Schedules,)
and Revised Rules.)

ORDER DENYING WITHOUT PREJUDICE MOLOKAI PUBLIC UTILITIES, INC.'S
MOTION TO DISMISS THE COUNTY OF MAUI AS AN INTERVENOR

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MOTION TO DISMISS THE COUNTY OF MAUI AS AN INTERVENOR

By this Order, the commission denies without prejudice MOLOKAI PUBLIC UTILITIES, INC.'s ("MPU") Motion to Dismiss the County of Maui as an Intervenor, filed on February 3, 2010.¹

I.

Background

On September 11, 2009, the County of Maui filed its Motion to Intervene, and on September 18, 2009, MPU filed its Memorandum in Opposition to the County's motion. On October 16, 2009, the commission granted the County's Motion to Intervene, subject to certain conditions and over MPU's objection.²

¹The Parties are MPU, MOLOKAI PROPERTIES LIMITED ("MPL"), the COUNTY OF MAUI ("County"), WEST MOLOKAI ASSOCIATION ("WMA"), and the DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, DIVISION OF CONSUMER ADVOCACY, an ex officio party to this proceeding, pursuant to Hawaii Revised Statutes ("HRS") § 269-51 and Hawaii Administrative Rules ("HAR") § 6-61-62(a).

²Order Granting Intervention to the County, WMA, and SFW, filed on October 16, 2009 ("Intervention Order").

On November 6, 2009, the commission issued its Order Approving Proposed Procedural Order, as Modified ("Procedural Order"). On November 10, 2009, the County issued its information requests to MPU, and on November 23, 2009, MPU filed its responses thereto. On December 7, 2010, the County issued its supplemental information requests to MPU, and on December 18, 2009, MPU filed its responses thereto.

On January 6, 2010, WMA timely filed its direct testimonies and exhibits. On January 11, 2010, the commission granted the timely requests for extensions of time, from January 6, 2010 to January 13, 2010, for the Consumer Advocate and the County to file their respective direct testimonies and exhibits.³

On January 13, 2010: (1) the Consumer Advocate filed its direct testimony and exhibits; and (2) the County filed its Statement Regarding Direct Testimony. In its written statement, the County noted:

. . . the County will not be submitting direct testimony in this proceeding and instead intends to establish, through cross-examination of witnesses and exhibits, that the proposed rate increases by [MPU] are unreasonable and unjust, and that MPU's water service does not comply with applicable federal, state and county water quality laws, rules and regulations.

The County acknowledges that the Commission granted the County's request for an extension of time to submit its direct testimony and

³The Consumer Advocate and the County affirmatively represented that MPU did not object to the requests for additional time.

exhibits The County appreciates the Commission's granting the County's request.

Statement Regarding Direct Testimony, at 1.

On January 19, 2010, the commission issued its Order Dismissing Stand for Water as an Intervenor. On February 3, 2010, MPU filed its Motion to Dismiss the County of Maui as an Intervenor.⁴ On February 8, 2010, MPU timely filed its rebuttal testimony and exhibits. On February 10, 2010, the County and WMA filed their respective oppositions to MPU's motion.⁵

Pursuant to the commission's Procedural Order, the remaining procedural steps include: (1) March 3, 2010, the deadline to file a settlement agreement, if any, with the commission; (2) March 10 and 17, 2010, the respective deadline dates to file statements of probable entitlement and responses thereto; and (3) the pre-hearing conference and evidentiary hearing. Moreover, as noted by the commission in its Procedural Order:

Consistent with HRS § 269-16(d), the commission shall make every effort to issue its final decision by March 29, 2010. If the commission does not issue its final decision by then, the commission shall issue its interim

⁴Motion to Dismiss the County of Maui as an Intervenor; Memorandum in Support of Motion; and Certificate of Service, filed on February 3, 2010, and Amended Certificate of Service, filed on February 4, 2010.

⁵County's Memorandum in Opposition to Motion to Dismiss County of Maui as an Intervenor; and Certificate of Service, filed on February 10, 2010 (collectively, "County's Opposition"); and WMA's Memorandum of Points and Authorities in Opposition to MPU's Motion to Dismiss the County of Maui as an Intervenor; and Certificate of Service, filed on February 10, 2010 (collectively, "WMA's Opposition").

decision by April 29, 2010, "if any, to which the commission, based on the evidentiary hearing before it, believes the public utility is probably entitled." The commission may postpone its interim decision until May 28, 2010, if the commission considers the evidentiary hearing to be complete.

Procedural Order, at 5.

A.

MPU's Motion

MPU, in support of its motion, contends:

1. The County has attempted to unreasonably broaden the issues by submitting overly broad and irrelevant information requests to MPU. As one example, the County has issued information requests on a proposed issue that was specifically rejected by the commission.

2. The County has failed to contribute to the development of a sound record and to meaningfully participate in this proceeding by failing to file any direct testimony. Accordingly:

Because the County refused to file direct testimony, MPU is foreclosed from "submission of IRs to [the County] on Direct Testimonies and Exhibits" in accordance with the Stipulated Regulatory Schedule incorporated in the Procedural Order. Further, MPU does not have any way of knowing which components of the rate proposal the County has objections to, thereby precluding settlement discussions and the ability to narrow the issues prior to hearing.

More importantly, . . . "[w]ithout . . . timely direct testimonies and exhibits, [the County] has failed to present any evidence or

arguments to which MPU may have the opportunity to rebut as part of the water utility's forthcoming rebuttal testimonies and exhibits."

MPU's Memorandum in Support, at 4-5 (brackets in original)(citation, footnote, and text therein omitted).

3. The County's continuing status as an intervenor will likely result in a protracted hearing and cause undue delay in bringing this case to a conclusion.

B.

County's Opposition

The County, in its written Opposition filed on February 10, 2010, counters that MPU's motion should be denied. In support thereto, the County asserts:

1. The County has not broadened the issues. Instead, the County's information requests are relevant, focusing on the issues identified by the commission in its Procedural Order.

2. The County's decision not to file direct testimony was based solely to save its resources to cross-examining witnesses at the evidentiary hearing, is not improper, and does not violate any commission rule or order. "The County has a right to participate in this proceeding and has the right to conduct cross-examination 'as may be required for a full and true disclosure of the facts.'"⁶ Moreover, the County does not intend to call any "surprise" witnesses at the evidentiary hearing as part of its direct case. In addition, since its

⁶County's Opposition, at 6 (quoting from HAR § 6-61-33).

position is based largely on legal principles rather than on disputed facts, "the County determined that no written direct testimony was necessary, and issues related to the reasonableness of the rate increases could be adequately addressed through cross-examination."⁷

3. In In re Molokai Public Util., Inc., Wai'ola O Molokai, Inc., and MOSCO, Inc., Docket No. 2008-0115 ("Docket No. 2008-0115"), the commission and the Consumer Advocate appeared to take the position that the County could be forced to acquire MPU, and the County is the only entity that has been identified as having any potential responsibility in the event MPU shuts down.⁸ Thus, the County's participation as an intervenor is necessary to protect its interests and is critical to developing a sound record.

4. MPU was not precluded from serving information requests upon the County.

C.

WMA's Opposition

WMA, in its written Opposition filed on February 10, 2010, likewise asserts that MPU's motion should be denied. In support thereto, WMA states:

1. The County was under no legal obligation to provide direct testimony, and its failure to do so was

⁷County's Opposition, at 7.

⁸The commission has collectively referred to the three utilities as the Utilities or MPL Utilities.

discretionary on the County's part. While the County's efforts to date may have fallen short of MPU's expectations, the "County's status as a party does not preclude productive settlement discussions, or for [the County] to otherwise perform in a contributory fashion at the evidentiary hearing."⁹

2. The issues in this case have not been broadened.

3. Consistent with HRS chapter 91, the parties to a contested case are entitled to a full evidentiary hearing if their interests may be adversely affected by a final ruling in an administrative agency proceeding, following reasonable notice. Moreover, the parties are afforded due process at each and every stage of the proceeding.

4. "In this proceeding, no party has yet been heard. In fact, the hearing has yet to be scheduled. All that has occurred up to this point in time is discovery and the submittal of proposed testimony, which has yet to be received into the evidentiary record. It would be fatally premature for the Commission to determine at this stage of the proceeding what contributions, if any, [the] County of Maui may make to the evidentiary record."¹⁰

II.

Discussion

In its Intervention Order, the commission granted the County's Motion to Intervene on the condition that the County's

⁹WMA's Opposition, at 2-3.

¹⁰WMA's Opposition, at 3-4.

participation would be limited to the issues raised in this docket, and stated that the commission would reconsider the County's participation in this docket if, at any time during the course of this proceeding, the commission determines that the County is unreasonably broadening the pertinent issues in this docket, unduly delaying the proceeding, or fails to contribute to the development of a sound record, meaningfully participate in this proceeding, or follow the commission's rules or orders.¹¹

Here, the commission is mindful that the County's lack of action in filing any direct testimonies or exhibits appears contrary to its representations in support of its Motion to Intervene that it would be: (1) unable to directly advocate its interests in this proceeding unless it was "permitted to intervene and submit the documents, testimony, and arguments necessary to present its position to the PUC[;]"¹² and (2) "able to provide much-needed context to the underlying issues which form the bases for . . . MPU's request[] for a rate increase."¹³ Nonetheless, the commission's underlying basis for allowing the County to intervene in Docket No. 2009-0048 was the County's "interest in ensuring that its citizens have access to basic water and wastewater services." Moreover, the commission, in Docket No. 2008-0115, openly requested that the County be ready to take over MPU's water utility operations in the event that MPU eventually discontinues its provision of water utility service.

¹¹Intervention Order, Ordering Paragraph No. 6, at 33.

¹²County's Motion to Intervene, at 9.

¹³County's Motion to Intervene, at 11.

Accordingly, in this specific instance, the commission finds that the County's decision not to file any direct testimonies or exhibits in support of its case, and instead, rely on its forthcoming cross-examination of the other parties' witnesses, does not warrant its dismissal as an intervenor at this time. Rather, such a decision goes to the weight of the County's direct case. In reaching this ruling, the commission also: (1) relies on the County's representations that it does not intend to call any "surprise" witnesses at the evidentiary hearing as part of its direct case, thereby precluding the potential to unreasonably broaden the issues in this docket or unduly delay the proceeding; and (2) notes that MPL, which the commission named as a party over its objections, also did not submit any direct testimonies or exhibits. In sum, while it is debatable as to whether the County, at this stage of the proceeding, has contributed to the development of a sound record or meaningfully participated, the commission, at this time, denies MPU's motion without prejudice.¹⁴

¹⁴The commission's previous action of dismissing, on its own motion, STAND FOR WATER ("SFW") as an intervenor is readily distinguishable from its decision herein of not dismissing the County as an intervenor at this stage of the proceeding. The commission, in finding that SFW had failed to contribute to the development of a sound record, meaningfully participate in this proceeding, or follow the commission's orders and directives, noted with specificity SFW's failure to adhere to the commission's deadlines and directives. Of particular note:

The deadline for SFW to file its direct testimonies and exhibits was January 6, 2010. SFW did not file any direct testimonies or exhibits, notwithstanding the fact that in its motion to intervene, which formed the basis for the commission's decision to grant SFW intervenor status, SFW listed eight "expert" witnesses on its behalf. Without

The commission, however, will direct the County to participate in good faith in any settlement discussions or negotiations initiated by one or more of the parties. MPU claims that it is precluded from pursuing settlement discussions due to the County's "refusal" to file direct testimony. In response, the commission notes that its denial of MPU's motion without prejudice shall not preclude the County's good-faith efforts in participating in any settlement discussions or negotiations initiated by one or more of the parties.

III.

Orders

THE COMMISSION ORDERS:

1. MPU's Motion to Dismiss the County as an Intervenor, filed on February 3, 2010, is denied without prejudice.

2. The County, in good-faith, shall participate in any settlement discussions or negotiations initiated by one or more of the parties.

SFW's timely direct testimonies and exhibits, SFW has failed to present any evidence or arguments to which MPU may have the opportunity to rebut as part of the water utility's forthcoming rebuttal testimonies and exhibits.

Order Dismissing Stand for Water as an Intervenor, filed on January 19, 2010, at 3 (footnote and text therein omitted) (emphasis added). Contrary to SFW's situation, the commission reiterates that the underlying basis for allowing the County to intervene in Docket No. 2009-0048 was the County's "interest in ensuring that its citizens have access to basic water and wastewater services."

DONE at Honolulu, Hawaii MAR - 1 2010.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairman

By John E. Cole
John E. Cole, Commissioner

By Leslie H. Kondo
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:

Michael Azama
Michael Azama
Commission Counsel

2009-0048.laa

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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